INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	3
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:	
Bogardus v. *Commissioner*, 302 U. S. 34	7
Brown v. *Helvering*, No. 658, October Term, 1942	8
Commissioner v. *Chamberlain*, 121 F. 2d 765	6, 8
Commissioner v. *Lamont*, 127 F. 2d 875	8
Harrison v. *Schaffner*, 312 U. S. 579	6, 7
Helvering v. *Achelis*, 112 F. 2d 929	6
Helvering v. *Clifford*, 309 U. S. 331	6, 7
Helvering v. *Eubank*, 311 U. S. 122	6
Helvering v. *Horst*, 311 U. S. 112	6, 7, 9
Helvering v. *Stuart*, 317 U. S. 154	6, 8
Hormel v. *Helvering*, 312 U. S. 552	6
Williamson v. *Commissioner*, 132 F. 2d 489	6, 7
Woolley v. *Commissioner*, 122 F. 2d 167, certiorari denied, 314 U. S. 693	8
Statutes:	
Revenue Act of 1934, c. 277, 48 Stat. 680:	
Sec. 22	3

519630—43

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 809

J. H. ANDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 810

MR. AND MRS. J. H. ANDERSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered a single memorandum opinion covering both cases (R. 13–15 [1]).

[1] With the exception of the years and amounts involved and the fact that the wife is a party in No. 810 by reason of the filing of a joint return, the records in the two cases are substantially identical. Accordingly references herein will be made only to the record in No. 809.

The decision is not officially reported. The opinion of the Circuit Court of Appeals (R. 22–27), likewise covering both cases, is reported at 132 F. 2d 98.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered December 2, 1942 (R. 21). Petitions for rehearing were filed on December 30, 1942 (R. 29), and orders denying the petitions were entered on February 2, 1943 (R. 41). The petitions for writs of certiorari were filed March 10, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer, in order to promote certain religious activities in which he was interested, created a trust the income of which, irrevocably for a period of about five and one-half years, was to be used for the furtherance of such purposes. Upon termination of the trust, title to the property comprising the corpus was to be restored to the taxpayer or his estate. The taxpayer retained broad powers of control over the management of the trust corpus, including the right, at any time, to remove the trustee and to appoint another. Was the taxpayer required to include the trust income as part of his gross income under Section 22 (a) of the Revenue Act of 1934?

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

STATEMENT

The case was tried entirely upon a stipulation of facts agreed to by the parties (R. 8–10) and adopted by the trial court as the findings of fact (R. 13). The findings which are pertinent to the issues here may be summarized as follows:

On July 21, 1931, the taxpayer executed a deed of trust by which he transferred certain notes, bonds, and corporate shares, then owned by him,

to the Hamilton National Bank of Knoxville, Tennessee, as trustee (R. 8–9, 42–43). Under the terms of the trust, the trustee was directed to collect the income as earned by the trust, and, after deducting necessary expenses and its fees, to pay the same to the First Baptist Church of Knoxville, Tennessee (R. 43). Because the taxpayer was interested in the development and furtherance of Baptist denominational work in the southern states, as outlined and determined by the Southern Baptist Convention, the money received by the First Baptist Church was to be used by that organization as part of its contribution to the Southern Baptist Convention (R. 42, 43).

The taxpayer reserved the right to revoke the trust on January 1, 1937, but not prior to that date. Upon termination of the trust on January 1, 1937, the title to all the property forming the corpus of the trust was to be reconveyed and restored to the taxpayer if he should be living, and if not, to be turned over to the executors named in the will of the taxpayer to become a part of his residuary estate (R. 44).

The trust instrument provided that the trustee should have the power to invest and reinvest the corpus of the trust and to exchange the securities of the trust for other securities of equal value, provided consent and approval of such changes were first obtained from the taxpayer (R. 43).

The trust further provided that the taxpayer should have the right during the period of the trust to vote all stocks held by the trustee at any meetings held by the corporations issuing the same as fully as though the taxpayer were the owner of the stocks and if necessary, the trustee was directed to execute any proxies required for such purposes (R. 43).

Any stock dividends received by the trustee were not to be considered income but were to be added to the corpus of the trust (R. 43–44).

The taxpayer retained, without qualification, the right to remove the named trustee and to select a successor trustee (R. 44).

The trustee was empowered to retain the securities constituting the trust fund without liability for any depreciation in their valuation and was excused from qualification, bond, or settlement as required by law (R. 44, 45).

The taxpayer included the income of the trust in his income tax return and later filed a claim for refund of the amount of taxes represented by such income (R. 10). The claim was denied (R. 10) and this suit resulted (R. 1–6).

The trial court held that the income of the trust was not properly a part of the taxpayer's income and gave judgment to the taxpayer for the amount in suit (R. 13–16). The Circuit Court of Appeals for the Sixth Circuit on the Government's appeal reversed the judgment of the District Court

with direction to dismiss the taxpayer's petition (R. 21).

ARGUMENT

The Circuit Court of Appeals held that the taxpayer retained such a measure of control over the principal of the trust, that for reasons explained in *Helvering* v. *Clifford,* 309 U. S. 331, and *Helvering* v. *Horst,* 311 U. S. 112, he was to be regarded as the owner of the property, and the income therefrom was to be attributed to him under Section 22 (a). See also *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579.

The taxpayer asserts (Pet. 8, Br. 23) the holding is in conflict with *Williamson* v. *Commissioner,* 132 F. 2d 489 (C. C. A. 7th), for the reason that the question involved is one of fact and the appellate court is bound by the finding of the trial court. He also asserts (Pet. 9–10, Br. 29–30) the decision is in conflict with *Commissioner* v. *Chamberlain,* 121 F. 2d 765 (C. C. A. 2d), in that the taxpayer here, in making his church the beneficiary of the trust income, received no economic gain. See also *Helvering* v. *Achelis,* 112 F. 2d 929 (C. C. A. 2d).

In further support of his petition the taxpayer suggests (Pet. 8–9) that the decision below probably is in conflict with *Helvering* v. *Clifford, supra; Hormel* v. *Helvering,* 312 U. S. 552, and *Helvering* v. *Stuart,* 317 U. S. 154.

Inquiry into the asserted and suggested conflicts discloses that they are without substantial merit.

Williamson v. *Commissioner, supra,* came before the Circuit Court of Appeals on an ultimate determination which the court was not prepared to hold as a matter of law was erroneous. In the instant case the reverse was true. But the difference in the cases was not one of principle. In neither case did the appellate court attempt to substitute its judgment as to the probative value of the evidentiary facts adduced. The difference in the cases lies in the fact that, here, the appellate court considered the ultimate determination of the trial court clearly erroneous by reason of its failure to apply to the evidentiary facts the proper principles of law as announced by this Court in *Helvering* v. *Clifford, supra,* and *Helvering* v. *Horst, supra.* See also *Harrison* v. *Schaffner, supra.*

Taxpayer's suggestion that the decision below conflicts with the expressions of this Court upon the point is equally without merit. That the "initial determination of whether or not on the facts of each case the grantor remains the owner for purposes of section 22 (a)" is a function of the trial court was not denied when the Circuit Court referred to the issue presented to it as being a mixed question of fact and law. *Helvering* v. *Clifford, supra,* p. 338; *Bogardus* v. *Com-*

missioner, 302 U. S. 34. If any continuing effect is to be given to the principles in *Helvering* v. *Clifford, supra,* and similar cases, clearly the initial determination cannot be considered so conclusive as to preclude review to ascertain if such principles have been applied.[2]

In his other contention that because of the absence of the family relationship the decision below conflicts with the decision of the Second Circuit in *Commissioner* v. *Chamberlain, supra,* the taxpayer has failed to note that court's later decision in *Commissioner* v. *Lamont,* 127 F. 2d 875, which is in harmony with the holding here. The *Chamberlain* case can not be regarded any longer as representing the views of the Second Circuit.

The final contention of the taxpayer is to the effect that the decision below probably is in conflict with *Helvering* v. *Stuart, supra,* because the nonmaterial satisfactions purchased by him through the medium of the trust may not be con-

[2] In *Woolley* v. *Commissioner*, No. 743, October Term, 1941, the petition for certiorari urged that the lower court erred in reversing (122 F. 2d 167 (C. C. A. 2d)) a decision of the Board of Tax Appeals holding the income of a trust not taxable to the grantor, because, under the *Clifford* case, the Board's ultimate finding, if supported by substantial evidence, was conclusive on appeal. The petition was denied, 314 U. S. 693. A similar contention was made in *Brown* v. *Helvering*, No. 658, October Term, 1942, with respect to the lower court's action (131 F. 2d 640 and 122 F. 2d 800 (C. C. A. 3d)). The petition there, likewise, was denied, March 1, 1943.

sidered economic gain for purposes of the statute. This contention appears to be based upon a distinction between the nonmaterial satisfactions accruing from a diversion of income to an object of his bounty beyond the family circle and one within the circle. *Cf. Helvering* v. *Horst, supra.* There appears to be no sound basis for such a distinction and the court below properly refused to recognize one. The *Stuart* case, when read in the light of its facts, affords no basis for the distinction, and the language of the opinion in the *Horst* case plainly supports the result reached herein.

The decision below is correct. It creates no conflict of principle between the circuits or with any decision of this Court. There appears no basis for invoking this Court's jurisdiction for the purpose of further review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
LYLE M. TURNER,
Special Assistants to the Attorney General.

APRIL 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943